

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

KENNETH JOHANSEN,

Plaintiff,

v.

EFINANCIAL LLC,

Defendant.

CASE NO. 2:20-cv-01351-RAJ-BAT

**REPORT AND  
RECOMMENDATION**

Defendant Efinancial LLC (“Efinancial”) moves for summary judgment pursuant to Fed. R. Civ. P. 56 on Plaintiff Kenneth Johansen’s claim that Efinancial violated the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. §§ 227 *et seq.* Dkt. 24. Plaintiff filed his Complaint on behalf of himself and all others similarly situated and alleges that Efinancial violated the TCPA by placing telephone calls to him and the putative class members whose telephone numbers are on the National Do-Not-Call (“DNC”) Registry in violation of 47 U.S.C. § 227(c) and 47 C.F.R. § 64.1200(c). Dkt. 1, ¶¶ 34–35. Efinancial contends that it is not liable for the one telephone call at issue in this case because it had express permission to telephone Plaintiff. Alternatively, Efinancial contends that it is entitled to TCPA’s safe harbor provision. Dkt. 24.

Plaintiff contends that Defendant’s business practices apply to and affect the members of the putative class uniformly and Defendant’s purported consent to call Plaintiff will be common for the entire proposed class, which Plaintiff describes as including “only persons from whom

Defendant claims to have obtained consent to call in the same manner Defendant claims to have obtained consent to call Plaintiff.” Dkt. 1, p. 5. On December 4, 2020, the Court entered an order bifurcating discovery on Plaintiff’s individual claim and class discovery. Dkt. 21. On April 16, 2021, Efinancial’s motion for summary judgment was filed. Presently at issue are two telephone calls placed by Efinancial, only one of which could subject Efinancial to liability under the TCPA. *See* 47 U.S.C. § 227(c)(5) (creating a private right of action under the TCPA after receipt of *more than one* telephone call within a 12-month period in violation of the regulations).<sup>1</sup>

Plaintiff filed a response in opposition to the motion for summary judgment. Dkt. 36; *see also* Dkt. 38 (Efinancial’s Reply). Having carefully reviewed the parties’ briefs, declarations in support and opposition, and balance of the record, the undersigned has determined that oral argument is not necessary and recommends that Efinancial’s motion be **granted**.

## FACTS

### A. Efinancial’s Policies and Procedures

Efinancial is an insurance agency that offers life insurance policies. Dkt. 24, Declaration of Marie Boisseau, Marketing Operations & Compliance Manager (“Boisseau Decl.”), ¶ 5. Efinancial has established and implemented written procedures to ensure compliance with the DNC rules, and those written procedures were in place in April 2020. *Id.*, ¶ 6; *id.*, Ex. D. Specifically, Efinancial maintains an Annual Teleservices Compliance Training, which includes those procedures and is provided to all Efinancial personnel who participate in telephone work on behalf of Efinancial and their managers. *Id.*, Boisseau Decl., ¶ 7. The presentation explains what the National DNC Registry is and its purpose. *Id.*, Boisseau Decl., Ex. D at 7. The

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<sup>1</sup> Efinancial called Plaintiff twice at his request after April 7, 2020, to discuss Plaintiff’s TCPA allegations. These calls are not at issue in this litigation.

1 presentation also explains how to identify do-not-call requests and, on a slide titled “DNC  
2 Compliance,” what to do when a do-not-call request is made. *Id.*, ¶¶ 8-11.

3 Efinancial uses this training guide to train personnel on compliance with these  
4 procedures. Dkt. 25, Boisseau Decl., ¶ 8. All customer-facing Efinancial employees and their  
5 direct supervisors are required to participate in this training and be certified in teleservices  
6 compliance. *Id.*, ¶ 9. Efinancial personnel receive this training at the start of their employment  
7 prior to any telephone communications with customers. *Id.*, ¶ 10. After completing the training,  
8 the employees are required to take a test on teleservices compliance and pass with a grade of  
9 80% to receive their certification that they have successfully completed the training and passed  
10 the test. *Id.*, ¶ 11.<sup>2</sup> Upon passing the test, the employee is certified and can begin communicating  
11 by telephone with customers. *Id.* Employees are given three attempts to pass the test, and if an  
12 employee exceeds three attempts, he will receive one-on-one live training from a manager before  
13 a final attempt to obtain certification. *Id.*, ¶ 12. Employees must complete this training annually  
14 or any time there is a change in regulations, systems, or protocols. *Id.*, ¶ 13.

15 Efinancial also maintains in its database a list of telephone numbers that its  
16 representatives may not contact. Dkt. 25, Boisseau Decl., ¶ 14. When a customer indicates that  
17 she or he no longer wants to receive calls from Efinancial, the customer’s information in  
18 Efinancial’s Automated Life Insurance Sales System (“ALISS”) is changed to “Dead File – Do  
19 Not Call” or the information is immediately noted as DNC in Efinancial’s Interactive  
20 Intelligence System. *Id.*, ¶ 15; *see also id.*, Boisseau Decl., Ex. C (showing Plaintiff’s  
21 information as “Dead File” in Efinancial’s database, meaning he is currently on Efinancial’s  
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23 <sup>2</sup>Exhibit D states that a 90% grade is required but the policy has since changed. Dkt. 25, Boisseau Decl., ¶ 11.

1 DNC list). The DNC designation ensures the person is not called again. *Id.*, Boisseau Decl., ¶ 16.

2 Efinancial also has a process to prevent calls to any telephone number on any list  
3 established pursuant to the DNC rules by ensuring that it has consent to call its customers. Dkt.  
4 25, Boisseau Decl., ¶¶ 17-18. Efinancial receives requests for life insurance through online  
5 landing pages where customers enter their contact information and request information from  
6 Efinancial about life insurance policies and to obtain a life insurance quote. *Id.* at ¶ 19. To submit  
7 an online request for information, the customer must provide consent to be called by Efinancial.<sup>3</sup>  
8 *Id.* Efinancial does not purchase data or lists containing consumer information that could belong  
9 to a customer who did not provide consent to be called by Efinancial. *Id.* at ¶ 21. Therefore, any  
10 request for information that Efinancial receives necessarily includes consent for Efinancial to call  
11 that customer. *Id.*, ¶ 22. Efinancial does not accept a request for life insurance information, a life  
12 insurance quote, and the customer's accompanying information, if the request does not include a  
13 flag that consent to be called was provided by the customer (unless that customer has called  
14 Efinancial directly themselves). *Id.*, ¶ 23.

15 Efinancial does not sell, lease, or use the National DNC Registry for any improper  
16 purpose. Dkt. 25, Boisseau Decl., ¶ 24. Efinancial also does not share the cost of accessing the  
17 National DNC Registry with other entities. *Id.*, ¶ 25. These practices and procedures are all part  
18 of Efinancial's routine business practice and were in place in April 2020. *Id.*, ¶ 26.

19 B. Plaintiff's Registration on National DNC Registry

20 Plaintiff attests that he registered his residential telephone number with the National DNC  
21 Registry in July of 2001. Dkt. 37, Declaration of Kenneth Johansen, ¶ 2.

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22  
23 <sup>3</sup> Alternatively, a customer may call Efinancial directly for these services, which telephone call  
would naturally not require prior consent. Dkt. 25, Boisseau Decl., ¶ 20.

C. Request for a Life Insurance Quote

On April 6, 2020, Efinancial received information purportedly from Plaintiff on its website, <https://feprogressive.efinancial.com>.<sup>4</sup> Dkt. 25, Boisseau Decl. ¶ 27; *id.*, Ex. A. To submit a quote request on this website, the customer must enter his or her first and last name, gender, date of birth, zip code, phone number, and email address, and must also consent to be called by Efinancial. *Id.*, Boisseau Decl., ¶ 32. The data for height, weight, tobacco use, term, and coverage that appears on this submission was temporarily auto-populated by Efinancial after the information was submitted. Dkt. 25, Boisseau Decl., ¶ 34. This information is adjusted later by the Efinancial representative who speaks to the customer. *Id.*

Efinancial received Plaintiff's information with a "Vendor Source" code that shows which website was used to submit the information. Dkt. 25, Boisseau Decl., ¶¶ 30-31. The "Vendor Source" code accompanying Plaintiff's information is associated with <https://feprogressive.efinancial.com>, thus confirming that the information was submitted through this website. *Id.*, ¶ 31. The following notice appears on the website below the button used to submit information to Efinancial:

Efinancial, LLC provides quotes from Fidelity Life and other insurers on this site. These entities are not affiliated with Progressive. By pressing the button above you agree to this website's Privacy Policy, and you consent to receive offers of insurance from Efinancial, LLC at the email address or telephone numbers you provided, including autodialed, pre-recorded calls, SMS or MMS messages. Message and data rates may apply. You recognize and understand that you are not required to sign this authorization in order to receive insurance services from eFinancial and you may instead reach us directly at (855) 627-1882.

*Id.*, ¶ 35.

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<sup>4</sup> Progressive's name is in the website URL because it is an affinity partner working with Efinancial to offer a co-branded experience for obtaining a life insurance quote. But Efinancial owns the website. Dkt. 25, Boisseau Decl. ¶ 28.

1 In the screenshot of the submission with Mr. Johansen’s information, “ewcautodial\_flas,”  
 2 “ewcprerecorded\_flas,” “ewcemail\_flas,” ewcsms\_flas,” and ewcmms\_flas” are all populated as  
 3 “true,” meaning that the information was provided with consent to receive autodialed calls,  
 4 prerecorded calls, emails, SMS messages, and MMS messages. *Id.*, ¶ 36.

5 After receiving Plaintiff’s information, Efinancial placed two telephone calls to Plaintiff.  
 6 *Id.* ¶ 37. Efinancial attempted to call him on April 6, 2020, but no one answered. *Id.*, ¶ 39;  
 7 Boisseau Decl., Ex. B. Efinancial called Plaintiff again on April 7, 2020, at which time Plaintiff  
 8 answered. *Id.* This telephone call was recorded by Efinancial. Dkt. 28, Declaration of Terance A.  
 9 Gonslaves, Ex. A (Certified Transcript of April 7, 2020 Phone Call Transcript (“Tr.”)). The call  
 10 lasted approximately 27 minutes. Dkt. 25, Boisseau Decl., ¶ 42. During the call, Plaintiff spoke  
 11 to two Efinancial representatives, Mr. Robert Zamora, a former Efinancial Business  
 12 Development Representative, and Ms. Baljeeet “Tina” Mangat, an Efinancial Account  
 13 Executive. *Id.* ¶ 41.

14 1. Background Information Regarding Mr. Zamora and Ms. Mangat

15 Mr. Zamora worked for Efinancial from July 2019 to July 2020. Dkt. 26, Declaration of  
 16 Robert Zamora (“Zamora Decl.”), ¶ 2. At the time of the April 7, 2020 telephone call to Plaintiff,  
 17 Mr. Zamora was a Business Development Representative for Efinancial. *Id.*, ¶ 3. His job  
 18 responsibilities involved communicating on the telephone with customers who submitted online  
 19 requests for information regarding life insurance. *Id.* At the beginning of his telephone  
 20 conversations with customers, Mr. Zamora received on his computer the information the  
 21 customers provided about themselves when they submitted their request to receive life  
 22 insurance information from Efinancial. *Id.*, ¶ 4. That information includes the customer’s name,  
 23 gender, date of birth, zip code, phone number, email address, and any other information that the

1 customer included in the request. *Id.* During his conversation with customers, Mr. Zamora  
2 verified the basic personal information the customer provided to Efinancial, and at times, he  
3 would request additional personal information related to the customer's request for information  
4 regarding life insurance policies. *Id.*, ¶ 5. After speaking with the customer and verifying the  
5 basic information the customer provided to Efinancial online and confirming the customer's  
6 interest to receive information regarding life insurance policies, Mr. Zamora would transfer the  
7 customer to an Efinancial Account Executive, who can provide the customer detailed  
8 information about available life insurance policies and the premiums for those policies. *Id.*, ¶ 6.  
9 When Mr. Zamora was hired by Efinancial, he received training on teleservices compliance,  
10 which included training regarding the TCPA and the Do Not Call regulations, among other  
11 teleservice compliance topics. *Id.*, ¶ 7. The training included the same topics in the Annual  
12 Teleservice Compliance Training attached as Exhibit D to the Declaration of Marie Boisseau.  
13 *Id.*, ¶ 8. After completing this training, Mr. Zamora took and passed a certification test on  
14 teleservices compliance before he had any telephone communications with customers over the  
15 phone. *Id.*, ¶ 9. He received his teleservices compliance certification on July 29, 2019 and had  
16 access to this Annual Teleservice Compliance Training during his employment at Efinancial and  
17 could review it at any time. *Id.*, ¶¶ 10-11.

18 Ms. Mangat began working for Efinancial in October 2019 and is currently employed at  
19 Efinancial as an Account Executive, a position she has held since April 2020. Dkt. 27,  
20 Declaration of Baljeet Mangat, ¶¶ 2-3. Ms. Mangat's job responsibilities involve talking to  
21 customers on the telephone about their life insurance needs, asking them questions about their  
22 health and lifestyle, providing them life insurance quotes, and submitting insurance applications  
23 on their behalf. *Id.*, ¶ 4. Ms. Mangat speaks with customers after they speak with a Business

1 Development Representative about basic pre-qualifying personal information. Dkt. 27, Mangat  
2 Decl., ¶ 5. The Business Development Representative – in this case, Mr. Zamora – transfers the  
3 call to an Account Executive — in this case, Ms. Mangat — if the customer continues to be  
4 interested in obtaining information about Efinancial’s life insurance policies. *Id.*

5 When the call is transferred, Ms. Mangat receives certain information that the customer  
6 provided to Efinancial in the customer’s online form and from the customer’s telephone call with  
7 the Business Development Representative. Dkt. 27, Mangat Decl., ¶ 6. That information  
8 normally includes the customer’s name, gender, date of birth, zip code, phone number, and email  
9 address. *Id.* Sometimes the information also includes answers to the questions asked by the  
10 Business Development Representative during the initial pre-screening telephone call, such as the  
11 customer’s address; whether the customer uses tobacco; whether the customer has been treated  
12 for cancer, heart disease, stroke, HIV/AIDS, or dementia; and whether the customer is confined  
13 to a nursing home or diagnosed as terminally ill. *Id.*

14 At the beginning of the call, Ms. Mangat normally introduces herself and provides  
15 background information on Efinancial. *Id.*, ¶ 7. Then she asks the customer about their insurance  
16 needs and a series of health and lifestyle questions. *Id.* The health and lifestyle questions include  
17 include questions regarding health conditions like high blood pressure, cancer, diabetes,  
18 depression, anxiety, sleep apnea, and epilepsy; recent hospitalizations or doctor visits;  
19 prescriptions for medicine; the customer’s job and household income; dangerous hobbies; traffic  
20 violations or charges for driving under the influence or reckless driving; drug and alcohol abuse;  
21 felony convictions; and bankruptcy. *Id.* After obtaining this information, Ms. Mangat generates  
22 an insurance quote and provides the customer with the amount of the monthly premium on a life  
23 insurance policy. *Id.*, ¶ 8. If the customer wants to enroll in the policy, Ms. Mangat submits the



1 customer's application using the information that she collected during the call. *Id.*

2 Ms. Mangat received training on teleservices compliance, which included training  
3 regarding the TCPA, the Do Not Call regulations, and other teleservice compliance topics. Dkt.  
4 27, Mangat Decl., ¶ 9. The training she received included the same topics in the Annual  
5 Teleservice Compliance Training attached as Exhibit D to Ms. Boissau's declaration (Dkt. 25).  
6 *Id.*, ¶ 10. After taking the training, Ms. Mangat took and passed a certification test on  
7 teleservices compliance before she had any communications with customers over the phone. *Id.*,  
8 ¶ 11. She received her teleservices compliance certification on October 17, 2019, and her second  
9 annual certification was delayed due to COVID-19. *Id.*, ¶ 12. Ms. Mangat has access to this  
10 Annual Teleservice Compliance Training and can review it at any time. *Id.*, ¶ 14.

11 2. April 7, 2020 Telephone Call with Efinancial

12 During the April 7, 2020 call, Plaintiff first spoke to Mr. Zamora, who immediately  
13 identified himself as an Efinancial representative who was calling in response to a life insurance  
14 request submitted by Plaintiff. Dkt. 28, Gonslaves Decl., Ex. A, Tr. 2:1–8. Mr. Zamora asked  
15 Plaintiff to confirm information that Plaintiff submitted with his life insurance request, including  
16 his date of birth, zip code, and email address. *Id.*, Tr. 2:9-3:16. Plaintiff confirmed that the  
17 information was correct. *Id.* Mr. Zamora also asked Plaintiff for his address, which Plaintiff  
18 provided, and then asked several questions about Plaintiff's medical and criminal history. *Id.*, Tr.  
19 2:22-4:8. During this interaction, Plaintiff answered all of Mr. Zamora's questions, made no  
20 objections, and never protested that Efinancial did not have his consent to telephone him. *See*  
21 *generally id.*, Tr. 2:1-4:9. Mr. Zamora then transferred Plaintiff to Ms. Mangat to obtain a life  
22 insurance quote. *Id.*, Tr. 4:9-16; Dkt. 26, Zamora Decl. ¶ 13.

Ms. Mangat began her conversation with Plaintiff by introducing herself, providing background information about Efinancial, and asking why Plaintiff was looking for life insurance. Dkt. 28, Gonslaves Decl., Ex. A, Tr. 4:18-6:11. Plaintiff responded that he was “concerned about . . . expenses, and you, know, taking care of everything.” *Id.*, Tr. 6:12-15. Ms. Mangat and Plaintiff then discussed his children, whether he had any other assets that would pass to his beneficiaries, and his mortgage. *Id.*, Tr. 6:16-8:22. Next, Ms. Mangat asked Plaintiff a series of questions related to criminal and medical history, including:

- Whether he had used any form of tobacco or nicotine in the past two years;
- Whether he had any moving violations, DUIs, or reckless driving charges in the past five years;
- Whether his driving license had ever been revoked or suspended;
- Whether he had been treated for any drug or alcohol abuse;
- Whether he had been convicted of a felony;
- Whether he had ever declared bankruptcy;
- Whether he had any dangerous hobbies;
- What he did for a living and his household income;
- Whether he had ever been treated for high blood pressure or cholesterol;
- Whether he ever had cancer, diabetes, heart disease, stroke, or heart attack;
- Whether he had ever been treated for depression or anxiety;
- Whether he had ever been treated for sleep apnea or COPD;
- Whether he had ever been treated for epilepsy or any other respiratory or health issues;
- Whether he had been prescribed any medications in the past five years;
- Whether he had any health issues that he has seen a doctor for in the past ten years;
- Whether he had any upcoming test, treatments, or surgeries; and
- Whether he had been hospitalized in the past two years.

Dkt. 28, Gonslaves Decl., Ex. A, Tr. 9:12-13:23.

Plaintiff answered all of the questions and in response to some, provided very specific and detailed health information. Plaintiff did not object to this line of questioning and did not contend that Efinancial did not have his consent to call him. *See id.*, Dkt. 28, Gonslaves Decl., Ex. A. Ms. Mangat then generated a quote and told Plaintiff they could submit his application,

1 and she would call him back the next day to let him know if he was approved. *Id.*, Tr. 15:8-16:8.  
2 Ms. Mangat asked Plaintiff for his legal name, which he provided, and confirmed his address.  
3 *Id.*, Tr. 16:13-22.

4 When Ms. Mangat asked for Plaintiff's driver's license number, Plaintiff began asking  
5 questions about her name, her telephone number, and the insurance company offering the quote,  
6 Fidelity Life. Dkt. 28, Gonslaves Decl., Ex. A, Tr. 18:1-21:15. Plaintiff asked whether Ms.  
7 Mangat had heard of a company called Accuquote and then told her that he was "concerned  
8 about the phone call" because his "number is on the do not call list." *Id.*, Tr. 21:16-24:12.  
9 Plaintiff then questioned Ms. Mangat as follows:

10 MR. JOHANSEN: Let me slow you down a little bit. Mostly, Tina, I'm concerned  
11 about the phone call.

12 MS. MANGAT: Uh-huh.

13 MR. JOHANSEN: My number is -- My number is on the do not call list.

14 MS. MANGAT: Uh-huh.

15 MR. JOHANSEN: And I guess I'm concerned that I didn't give you consent to call  
16 me.

17 MS. MANGAT: Okay. Did you put in a request somewhere?

18 MR. JOHANSEN: No. Where did you get my information?

19 MS. MANGAT: Did you go online and request a quote?

20 MR. JOHANSEN: No. Where did you get my information?

21 MS. MANGAT: Online. It's usually when people request a quote or something  
22 like that.

23 MR. JOHANSEN: Okay. Where did you get my information?

MS. MANGAT: I don't know. You -- I -- It just showed up. Did you have  
anything to do with Progressive?

1 MR. JOHANSEN: No...Let me rephrase my question, Tina, and make it easier  
2 for you. Who supplied my lead to you?

3 MS. MANGAT: It's not showing up. We get it from various -- various places...

4 MR. JOHANSEN: Okay. Can you give me a contact within eFinancial so that I  
5 can do the right thing here? Or I mean, I can -- I can communicate with you but  
6 eventually you're going to have to

7 MS. MANGAT: Right, move you. You can probably reach out to the number on  
8 the website.

9 MR. JOHANSEN: Is there an eFinancial website?

10 MS. MANGAT: Yes. And I can put on our do not call list. Okay?

11 MR. JOHANSEN: Oh, please do that for sure.

12 Dkt. 28, Ex. A, Tr. 24:18-27:9.

13 Plaintiff was placed on Efinancial's DNC list, and Efinancial has not since called Plaintiff  
14 for purposes of a providing a life insurance quote. Dkt. 25, Boisseau Decl., ¶ 45.

15 Portions of an email string produced by Plaintiff reflect that Plaintiff made a request to  
16 Efinancial for the "lead submission information," and that information was provided to him on  
17 April 30, 2020. Dkt. 36, Ex. 2. On May 21, 2020, Plaintiff responded with an email entitled  
18 "Letter of Intent to File a Telephone Consumer Protection Act Claim", stating in relevant part:

19 Thank you for providing the consent data you have related to my telephone  
20 number. The data you provided confirms that I could not have been responsible  
21 for the data entry. The IP address is a Google ISP located in Mountain View,  
22 California. I have no connection with Google and have not recently been in  
23 California. The Last Name is misspelled "Johanson". The "dob", the "height" and  
the "weight" data are not even close. You initiated a telephone call to me one  
minute after the data was received by your system. I did not provide my consent  
to your company to make telemarketing calls to me....

Dkt. 36, Ex. 2, p. 2.

#### SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when, viewing the facts in the light most favorable to

1 the nonmoving party, there is no genuine dispute as to any material fact that would preclude the  
 2 entry of judgment as a matter of law. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th  
 3 Cir.2000). The party seeking summary dismissal of a claim “bears the initial responsibility of  
 4 informing the district court of the basis for its motion” (*Celotex Corp. v. Catrett*, 477 U.S. 317,  
 5 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)) and identifying those portions of the materials in  
 6 the record that show the absence of a genuine issue of material fact (Fed. R. Civ. P. 56(c)(1)).

7       Once the moving party has satisfied its burden, it is entitled to summary judgment if the  
 8 non-moving party fails to designate “specific facts showing that there is a genuine issue for  
 9 trial.” *Celotex Corp.*, 477 U.S. at 324. “The mere existence of a scintilla of evidence in support  
 10 of the non-moving party's position is not sufficient:” the opposing party must present probative  
 11 evidence in support of its claim or defense. *Arpin v. Santa Clara Valley Transp. Agency*, 261  
 12 F.3d 912, 919 (9th Cir.2001); *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551,  
 13 1558 (9th Cir.1991). In other words, “summary judgment should be granted where the  
 14 nonmoving party fails to offer evidence from which a reasonable jury could return a verdict in its  
 15 favor.” *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir.1995).

## 16       DISCUSSION

17       The TCPA creates a cause of action for a person who receives more than one telephone  
 18 call within a 12-month period in violation of the corresponding regulations. 47 U.S.C. § 227(c).  
 19 The regulation prohibits telephone solicitations to residential telephone subscribers who have  
 20 registered their phone numbers on the National DNC Registry. 47 C.F.R. § 64.1200(c)(2).

### 21       A.     Prior Invitation or Permission

22       Even if a telephone subscriber has registered his telephone number on the National DNC  
 23 Registry, the caller will not be subject to liability if it first obtained “the subscriber’s prior

1 express invitation or permission” that is “evidenced by a signed, written agreement between the  
 2 consumer and seller which states that the consumer agrees to be contacted by this seller and  
 3 includes the telephone number to which the calls may be placed.” 47 C.F.R. § 64.1200(c)(2)(ii).  
 4 “The plain language of the TCPA shows that ‘express consent’ and ‘express invitation or  
 5 permission’ are interchangeable.” *Physicians Healthsource, Inc. v. Cephalon, Inc.*, 954 F.3d 615,  
 6 621 (3d Cir. 2020).

7 The FCC has determined that the signed, written agreement requirement may be fulfilled  
 8 by submission of a website form. *See Rules & Regulations Implementing the TCPA of 1991*,  
 9 C.G. Dkt. No. 02-278, Report and Order, 27 FCC Rcd 1830, 1844 (2012). Applying this  
 10 guidance, courts have found that a person can provide prior express permission by submitting a  
 11 web form with personal information when the web form includes a notice that the person agrees  
 12 to be contacted. *Morris v. Modernize, Inc.*, No. AU-17-CA-00963-SS, 2018 WL 7076744, at \*6-  
 13 8 (W.D. Tex. Sept. 27, 2018).

14 It is undisputed that Efinancial received Plaintiff’s name and telephone number from a  
 15 submission on Efinancial’s website <https://feprogressive.efinancial.com>. Dkt. 25, Boisseau Decl.  
 16 ¶¶ 29-31; *id.*, Ex. A. The notice on this website, which is directly below the button used to  
 17 submit information, clearly states that by submitting information to request a life insurance  
 18 quote, the person “consent[s] to receive offers of insurance from Efinancial, LLC at the . . .  
 19 telephone numbers you provided . . .” *Id.*, Boisseau Decl., ¶ 35. The submission received by  
 20 Efinancial includes data indicating that Plaintiff provided consent to be called, emailed, and to  
 21 receive SMS and MMS messages. *Id.*, ¶ 36; Boisseau Decl., Ex. A.

22 In his declaration, Plaintiff states “[a]ll of the statements I made [in the transcript]  
 23 regarding the fact that I did not visit the website inquired about during the call were accurate.”

1 Dkt. 37, ¶ 11. During his discussion with Ms. Mangat, Plaintiff stated that he did not go online  
2 and request a quote. Dkt. 28, Ex. A, Tr. 24:18-27:9. However, Plaintiff's behavior during the  
3 April 7, 2020 telephone call indicates that he did consent to be called. When Plaintiff answered  
4 the call, Mr. Zamora immediately identified himself as calling from Efinancial "in response to  
5 the life insurance request that you submitted." *Id.*, Tr. 2:1-7. Thus, Plaintiff knew that it was a  
6 representative from Efinancial who was calling "in response" to Plaintiff's request. If Plaintiff  
7 did not submit the "life insurance request," he could have said so at that point and ended the call.  
8 Instead, Plaintiff engaged in conversations with Mr. Zamora and Ms. Mangat for almost 27  
9 minutes and during these conversations, Plaintiff discussed very personal details about his  
10 background and health. Dkt. 25, Boisseau Decl., ¶ 42. In addition to confirming the personal  
11 information submitted online, Plaintiff provided the Efinancial representatives with his home  
12 address, information about his mortgage, income, and children (*see* Dkt. 28, Ex. A, Tr. 3:9-10;  
13 6:16-8:15; 11:21-23); and information about tobacco use, moving violations, criminal  
14 convictions, medical diagnoses, medical treatments, and hospitalizations. *Id.*, Tr. 9:12-13:23.

15 Plaintiff argues that there is "nothing wrong with a consumer advocate posing as an  
16 interested customer"; that in essence, he was acting as a private attorney general; and, during the  
17 telephone call, he was "investigating" the "caller ... to determine the sources and basis for the  
18 call...." Dkt. 36 at 7. Significantly, Plaintiff makes no mention in his declaration that he was  
19 posing as an interested customer after receiving a call that he did not request. Moreover, the  
20 transcript reflects that Plaintiff had no need to investigate source of the caller because the  
21 Efinancial representative immediately identified himself as calling from Efinancial. Plaintiff also  
22 provides no explanation for why he engaged in a lengthy discussion with two Efinancial  
23 representatives and why Plaintiff provided so much personal information. The provision of this

1 information was not necessary to conduct any “investigation,” and there was no reasonable basis  
2 for Plaintiff to provide this very private information other than a genuine interest in obtaining a  
3 life insurance quote. In fact, it was not until Ms. Mangat provided an insurance quote, that  
4 Plaintiff first claimed he had not consented to be called. Dkt. 28, Gonslaves Decl., Ex. A, Tr.  
5 15:15-25:1.

6 Plaintiff attests to the accuracy of his prior claim that he did not visit Efinancial’s website  
7 but provides no facts or supporting evidence, *i.e.*, the internet browser history for his computer  
8 and/or other devices for April 6, 2020, or other information regarding his whereabouts or  
9 activities to show that it was impossible for him to have submitted the online form. Instead,  
10 Plaintiff speculates that someone else submitted his information online. First, he claims that the  
11 IP address for the request submission is located in California and reflects Google as the internet  
12 service provider, while Plaintiff lives in Ohio and claims he does use Google. It is, however,  
13 recognized that IP addresses can be unreliable indicators of physical location. *See, e.g.*,  
14 *Commonwealth v. Molina*, 71 N.E.3d 117, 126 (Mass. 2017) (finding that an IP address alone is  
15 too unreliable to support probable cause); *see also* A. Mackey, S. Schoen, & C. Cohn, Unreliable  
16 Informants: IP Addresses, Digital Tips and Police Raids, ELECTRONIC FRONTIER  
17 FOUNDATION (Sept. 2016), at 8-10,<sup>5</sup> (explaining “why IP addresses alone are not always  
18 location proxies”); *Molina*, 71 N.E.3d at 122 n.2 (“An IP address does not identify an exact  
19 physical location, only an electronic destination on the Internet.”). Indeed, while Plaintiff claims  
20 that the IP address associated with his request is located in California, various publicly available  
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23 <sup>5</sup> *See* [https://www.eff.org/files/2016/09/22/2016.09.20\\_final\\_formatted\\_ip\\_address\\_white\\_paper\\_0.pdf](https://www.eff.org/files/2016/09/22/2016.09.20_final_formatted_ip_address_white_paper_0.pdf)



1 websites list the IP address as being located in North Charleston, South Carolina.<sup>6</sup> As noted by  
 2 EFinancial, this evidence simply underscores the unreliability of IP addresses and provides no  
 3 meaningful information about who submitted the online form for a life insurance quote.

4 Plaintiff next notes that “the IP address appears on a list of public proxies posted on the  
 5 *same day* of the purported opt in on a website thread in the Philippines related to technology and  
 6 computer hacking.” Dkt. 36 at 13 (emphasis in original). To the extent Plaintiff is speculating  
 7 that a hacker submitted the life insurance quote request, “mere allegation and speculation do not  
 8 create a factual dispute for purposes of summary judgment.” *Nelson v. Pima Cmty. Coll.*, 83 F.3d  
 9 1075, 1081-82 (9th Cir. 1996). It is also entirely unclear why a hacker would want to pose as  
 10 Plaintiff simply to obtain an insurance quote.

11 Plaintiff also claims that the date of birth, height, and weight provided to Efinancial are  
 12 inaccurate. However, as explained by Ms. Boisseau, height and weight, among other data points,  
 13 are temporarily auto-populated when a customer submits a request for a life insurance quote.  
 14 Dkt. 25, Boissau Decl., ¶ 34. The height and weight are admittedly not Plaintiff’s height and  
 15 weight and are not probative of whether Plaintiff entered the online request.

16 Finally, Plaintiff claims that he has never heard of the email address that was provided  
 17 with his request, *i.e.*, domiallender@aol.com. A simple Google search of the email address  
 18 performed by Efinancial reveals that it is associated with a person named John A. Johansen, who  
 19 is associated with the exact same address that Plaintiff provided to Efinancial during the April 7,  
 20 2020 call.<sup>7</sup> EFinancial also found another publicly available website that links a John A.  
 21 Johansen to Plaintiff’s phone number and address and lists “Kenneth W. Johansen” as a possible

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22 <sup>6</sup> See <https://www.ip-adress.com/ip-address/ipv4/34.73.42.211>;  
 23 <https://whatismyipaddress.com/ip/34.73.42.211.1>

<sup>7</sup> See 2 <https://thatsthem.com/name/John-A-Johansen>

1 relative.<sup>8</sup>

2 According to Efinancial, this is not the first time Plaintiff has engaged in this type of  
3 “bait-and-switch” behavior and has in fact, filed at least 39 other TCPA cases in the last six  
4 years. In one of those lawsuits, Plaintiff admitted that he had no desire to enroll in the company’s  
5 services “but played along ‘as he typically does.’” The district court in that case found that  
6 Plaintiff’s “deceptive conduct gave [the defendant] an objectively reasonable basis for believing  
7 that [plaintiff] had established a business relationship with [defendant]. *Johansen v. Nat’l Gas &*  
8 *Elec. LLC*, No. 2:17-cv-587, 2018 WL 3933472 (S.D. Ohio Aug. 16, 2018). Similarly, if Plaintiff  
9 had no intention of obtaining an insurance quote from EFinancial, the undersigned concludes that  
10 his deceptive behavior during the telephone call reflected otherwise.

11 When the non-moving party fails to produce enough evidence to create a genuine issue of  
12 material fact, as Plaintiff has done here, summary judgment in favor of the moving party is  
13 warranted. *United States v. Elmore*, No. C05-0810JLR, 917 F.3d 1068, \*13 (W.D. Wash. July  
14 12, 2012). In light of the evidence presented, the undersigned concludes that no reasonable jury  
15 could find that someone other than Plaintiff submitted the online request to obtain a life  
16 insurance quote and provided consent to be called. As such, no genuine issue of material fact  
17 exists and it is recommended that summary judgment be entered in favor of Efinancial.

18 B. TCPA Safe Harbor Provision

19 Alternatively, Efinancial contends that summary judgment is warranted because the  
20 TCPA’s safe harbor defense applies.

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<sup>8</sup> See <https://www.truepeoplesearch.com/details?name=John%20Johansen&citystatezip=Dublin%2C%20OH&rid=0x0>.

1 The TCPA provides that “[i]t shall be an affirmative defense in any action brought under  
 2 this paragraph that the defendant has established and implemented, with due care, reasonable  
 3 practices and procedures to effectively prevent telephone solicitations in violation of the  
 4 regulations prescribed under this subsection.” 47 U.S.C. § 227(c)(5). If an entity has violated the  
 5 TCPA, it can avoid liability if the call was placed in error and that “as part of its routine business  
 6 practice,” it meets various standards, which are discussed in more detail below. 47 C.F.R. §  
 7 64.1200(c)(2)(i).

8 1. The Telephone Call Was in Error

9 Assuming Plaintiff did not submit the online request for an insurance quote, Efinancial  
 10 argues that the safe harbor defense applies because it called Plaintiff in error and it complies with  
 11 the safe harbor provisions. Plaintiff argues that the safe harbor defense does not apply in  
 12 situations where Efinancial intentionally directed the telephone call to Plaintiff without regard to  
 13 whether his telephone number was registered on the National DNC Registry and whether his  
 14 telephone number was or should have been registered in Efinancial’s internal DNC list. Plaintiff  
 15 also argues that even if the telephone call can be construed as having been made in error,  
 16 Efinancial has failed to demonstrate that it meets the required regulatory standards.

17 The first requirement of the safe harbor provision is that the call was placed in error. “A  
 18 party can support a claim of error by showing that the telephone solicitation was made  
 19 unintentionally.” *Simmons v. Charter Commc’ns, Inc.*, 222 F. Supp. 3d 121, 135 (D. Conn.  
 20 2016), *aff’d*, 686 F. App’x 48 (2d Cir. 2017). “An error claim should be supported by evidence  
 21 showing that otherwise unlawful telephone solicitations were made unintentionally and detailing  
 22 any procedural breakdowns that led to such calls.” *Dynasty Mortgage, LLC, Notice of Apparent*  
 23 *Liability for Forfeiture*, 20 FCC Rcd 4921, 4929 (2005). Nevertheless, “it is not clear that

1 procedural breakdown is the *sine qua non* of the safe harbor provision.” *Simmons*, 222 F. Supp.  
2 3d at 135. As such, courts are left with “[u]sing the ordinary definition of the word ‘error,’”  
3 which “is in line with the TCPA’s goal of encouraging the use of ‘reasonable practices and  
4 procedures.’” *Id.* At least one court has relied on the definition of “error” found in Black’s Law  
5 Dictionary, which is “[a]n assertion or belief that does not conform to objective reality; a belief  
6 that what is false is true or that what is true is false; [a] mistake.” *Id.*

7 Plaintiff points to several cases that stand for the proposition that there is no good-faith  
8 defense to TCPA liability. Dkt. 36 at 12-13. Efinancial is not arguing a good-faith defense;  
9 instead, it contends that its call to Plaintiff was based on the mistaken but reasonable belief that  
10 Plaintiff provided consent to be called, thus qualifying it for the safe harbor defense. *See, e.g., N.*  
11 *L. v. Credit One Bank, N.A.*, 960 F.3d 1164, 1170 (9th Cir. 2020) (noting that safe harbor  
12 defenses are necessary because intent cannot defeat TCPA liability).

13 Plaintiff also argues that no court has found a factual circumstance such as this one to  
14 amount to a safe harbor defense. However, the lack of occasion for courts to consider the  
15 application of the safe harbor defense does not mean that it does not apply here. Plaintiff further  
16 argues that if the Court were to find that Efinancial’s call to Plaintiff was in error, then every  
17 defendant would be able to avoid TCPA liability by claiming it had permission to contact the  
18 plaintiff. This theory does not make sense under the circumstances presented. There is no  
19 evidence that Efinancial assumed, without reason, that Plaintiff consented to be called. Instead,  
20 the evidence reflects that Efinancial’s internal processes ensure that it will not receive this  
21 information if consent is not first provided. *See* Dkt. 25, Boisseau Decl., ¶¶ 19-23. Thus,  
22 Efinancial could reasonably believe that Plaintiff submitted the form on its website and  
23 consented to be called because it received verified information online which purported to be

1 from and about Plaintiff. *See id.*, ¶¶ 18-22. Moreover, during almost the entire April 7, 2020  
 2 telephone call, Plaintiff led Mr. Zamora and Ms. Mangat to believe that he submitted the request,  
 3 consented to be called, and was interested in obtaining a life insurance policy.

4 If in fact, the person who submitted the form and consent to be called was a hacker, as  
 5 Plaintiff suggests, then Efinancial would be understandably mistaken in its belief that Plaintiff  
 6 had consented to the call. If Plaintiff did not submit the online form – despite all evidence to the  
 7 contrary – then Efinancial’s telephone calls to Plaintiff were in error. This satisfies the first  
 8 requirement of the safe harbor provision.

## 9 2. Regulatory Requirements

10 Additionally, Efinancial has provided evidence that, as part of its routine business  
 11 practice, it complies with the standards required by the safe harbor provision, *i.e.*, (1) “written  
 12 procedures to comply with the national do-not-call rules;” (2) training of personnel on those  
 13 procedures; (3) maintenance of a list of phone numbers that the entity cannot contact; (4) the use  
 14 of “a process to prevent telephone solicitations to any telephone number on any list established  
 15 pursuant to the do-not-call rules;” and (5) the use of “a process to ensure that it does not sell,  
 16 rent, lease, purchase or use the national do-not-call database, or any part thereof, for any purpose  
 17 except compliance with this section and any such state or federal law to prevent telephone  
 18 solicitations to telephone numbers registered on the national database.” 47 C.F.R. §  
 19 64.1200(c)(2)(i)(A)-(E); *see also Mattson v. New Penn Fin.*, No. 3:18-cv-00990-YY, 2020 U.S.  
 20 Dist. LEXIS 197955, at \*13 (D. Or. Oct. 25, 2020) (listing these requirements for establishing  
 21 the safe harbor defense). Efinancial details its compliance with these regulatory standards in its  
 22 motion. *See* Dkt. 24, 22-25. Plaintiff takes issue with just two of the standards: maintenance of  
 23 an internal do-not-call list and the purchase and access of the National DNC Registry.

1           1.       Internal Do-Not-Call List

2           Plaintiff argues that there is a dispute as to whether Efinancial maintains an internal do-  
3 not-call list because Plaintiff received calls from Efinancial after requesting to be placed on  
4 Efinancial's do-not-call list in 2015. The undersigned does not find the existence of a material  
5 issue of dispute.

6           As previously noted, the summary judgment reflects that Efinancial maintains an internal  
7 do-not-call list (*see* Dkt. 25, Boisseau Decl. ¶¶ 14-16) and there is no evidence that Plaintiff  
8 received any calls from Efinancial until April 7, 2020 – and that call was triggered by the online  
9 written consent from Plaintiff (or someone purporting to be Plaintiff). The consent received by  
10 Efinancial for that telephone call negated any need for it to check its internal do-not-call list.  
11 Additionally, Efinancial placed Plaintiff on its do-not-call list immediately at the end of his  
12 conversation with Ms. Mangat on April 7, 2020.

13           2.       Purchase of the National DNC Registry

14           Plaintiff also argues that the safe harbor defense is unavailable to Efinancial because it  
15 did not proffer evidence to show that Efinancial has purchased and accessed the National DNC  
16 Registry. Efinancial acknowledges that the regulation references the purchase of and access to  
17 the National DNC Registry, but urges application of the safe harbor defense here because it  
18 substantially complies with the regulation in a manner that fulfills the TCPA's purpose. The  
19 undersigned agrees.

20           “Substantial compliance with regulatory requirements may suffice when such  
21 requirements are procedural and when the essential statutory purposes have been fulfilled.”  
22 *Shotgun Delivery, Inc. v. United States*, 269 F.3d 969, 973-74 (9th Cir. 2001); *see also Sawyer v.*  
23 *Cnty. of Sonoma*, 719 F.2d 1001, 1008 (9th Cir. 1983) (“[T]he doctrine can be applied only

1 where invocation thereof would not defeat the policies of the underlying statutory provisions.”).

2 Efinancial has proffered evidence that it has established procedures that fulfill the  
3 TCPA’s purpose – it only calls customers who provide consent to be called; it trains its personnel  
4 on do-not-call procedures; and it maintains an internal do-not-call list. These practices ensure  
5 that Efinancial fulfills the TCPA’s purpose: “to protect consumers from the unwanted intrusion  
6 and nuisance of unsolicited telemarketing phone calls and fax advertisements.” *Van Patten v.*  
7 *Vertical Fitness Grp.*, 847 F.3d 1037, 1043 (9th Cir. 2017). Because Efinancial calls only those  
8 customers who have requested a life insurance quote and consented to be called, it does not need  
9 to access the National DNC Registry. Based on this evidence, the undersigned concludes that  
10 Efinancial’s internal processes comport with the spirit of the TCPA and its implementing  
11 regulations, and Efinancial’s processes and procedures fulfill the TCPA’s essential statutory  
12 purpose of preventing unsolicited phone calls.

13 Plaintiff also argues that Efinancial *should* have known that he was not the one who  
14 submitted the request and provided consent. Accepting this theory of liability puts Efinancial and  
15 other similar companies who require consent to be contacted in an untenable position as they  
16 would no longer be able to rely on any consent that they receive from customers who actually  
17 want to be contacted. Such a result is not required by the TCPA. *See e.g.*, Congressional  
18 Statement of Findings, § 2 of Pub. L. 102-243 (Dec. 20, 1991) (“Individuals’ privacy rights,  
19 public safety interests, and commercial freedoms of speech and trade must be balanced in a way  
20 that protects the privacy of individuals and permits legitimate telemarketing practices.”); In the  
21 Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,  
22 7 FCC Rcd. 8752, 8754 (F.C.C. Sept. 17, 1992) (FCC acknowledgment that its task was “to  
23 implement the TCPA in a way that reasonably accommodates individuals’ rights to privacy as

well as the legitimate business interests of telemarketers.”).

## CONCLUSION

Efinancial is entitled to summary judgment on Plaintiff’s TCPA claims because the competent summary judgment evidence reflects that Plaintiff consented to being called by Efinancial on April 7, 2020. Alternatively, Efinancial is entitled to summary judgment because it is entitled to TCPA’s safe harbor provision.

## OBJECTIONS AND APPEAL

This Report and Recommendation is not an appealable order. Therefore, a notice of appeal seeking review in the Court of Appeals for the Ninth Circuit should not be filed until the assigned District Judge enters a judgment in the case.

Objections, however, may be filed and served upon all parties no later than **June 28, 2021**. The Clerk should note the matter for **June 30, 2021**, as ready for the District Judge’s consideration if no objection is filed. If objections are filed, any response is due within 14 days after being served with the objections. A party filing an objection must note the matter for the Court’s consideration 14 days from the date the objection is filed and served. The matter will then be ready for the Court’s consideration on the date the response is due. Objections and responses shall not exceed six (6) pages. The failure to timely object may affect the right to appeal.

DATED this 11th day of June, 2021.



BRIAN A. TSUCHIDA  
Chief United States Magistrate Judge